

Hanyang Communications Co Ltd v Perspektif Masa Sdn Bhd A

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO
22NCVC-213-04 OF 2015
MOHD FIRUZ JC
29 NOVEMBER 2016

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Contract — Unjust enrichment — Contracts Act 1950, s 71 — Plaintiff dealt with company known as Menos to provide advertising services for defendant — Menos failed to pay for plaintiff services — Plaintiff sued defendant for unjust enrichment — Whether defendant unjustly enriched

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Limitation — Contract — Claim — Plaintiff dealt with company known as Menos to provide advertising services for defendant — Menos failed to pay for plaintiff services — Plaintiff sued defendant for unjust enrichment under s 71 of the Contracts Act 1950 — Whether plaintiff's claim time-barred by virtue of s 6(1) and (2) of the Limitation Act 1953 — Limitation Act 1953 s 6(1), (2) & (6)

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The defendant, a developer agreed with a Korean company known as Menos, to work together to promote, market and sell the condominium units in the defendant's housing project. Menos in turn appointed the plaintiff to provide advertising services for the defendant. Menos failed to pay for the advertising services provided by the plaintiff and could not be located. Consequently, on 28 April 2015, the plaintiff filed the present action against the defendant based on s 71 of the Contracts Act 1950 and claimed for unjust enrichment against the defendant. The issues for court's consideration were: (a) whether the defendant had been unjustly enriched by the plaintiff's provision of advertising services for the defendant's housing project; and (b) whether the plaintiff's claim time-barred by virtue of s 6(1) and (2) of the Limitation Act 1953 ('the Act').

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Held, dismissing the plaintiff's claim with costs of RM40,000: H

- (1) Based on the oral and documentary evidence adduced by the plaintiff's witness, PW1, there was ample evidence that the defendant benefited from the work carried out by the plaintiff for Menos. Therefore, there was unjust enrichment by the defendant (see para 15). I
- (2) The claim was time-barred, not on the basis of s 6(1) and (2) of the Act, but under s 6(6) of the Act which was the correct provision of law which supported the limitation of a claim for unjust enrichment. Based on the agreement between the plaintiff and Menos, the plaintiff's cause of action

- A for all invoices issued by Menos would have been not later than 15 July 2008. The limitation period applicable to the plaintiff's cause of action against the defendant ran parallel with the plaintiff's cause of action against Menos as the cause of action arose out of the failure of Menos to pay for the advertising works. The cause of action for the plaintiff against the defendant arose from the date the advertising services were supplied by the plaintiff to the defendant. There was no requirement that the plaintiff must have first given a notice of demand to the defendant before the cause of action for restitution arises (see paras 17, 19 & 22–25).

C **[Bahasa Malaysia summary]**

- Defendan, pemaju perumahan bersetuju dengan syarikat Korea yang dikenali sebagai Menos, untuk bekerjasama mempromosikan, memasarkan dan menjual unit-unit pangsapuri di dalam projek perumahan defendan. Menos sebaliknya melantik plaintif untuk memperuntukkan perkhidmatan pengiklanan untuk defendan. Menos gagal untuk membayar untuk perkhidmatan pengiklanan yang diberikan oleh plaintif dan tidak dapat dikesan. Akibatnya, pada 28 April 2015, plaintif memfailkan tindakan ini terhadap defendan berdasarkan s 71 Akta Kontrak 1950 dan menuntut bagi pengkayaan tak adil terhadap defendan. Isu-isu untuk pertimbangan mahkamah adalah: (a) sama ada defendan telah mendapat pengkayaan tak adil oleh peruntukan plaintif terhadap perkhidmatan pengiklanan bagi projek perumahan defendan; dan (b) sama ada tuntutan plaintif dihalang masa mengikut s 6(1) dan (2) Akta Had Masa 1953 ('Akta').

F **Diputuskan**, menolak tuntutan dengan kos sebanyak RM40,000:

- (1) Berdasarkan atas keterangan lisan dan dokumentar yang dikemukakan oleh saksi plaintif, PW1, terdapat keterangan jelas bahawa defendan mendapat faedah daripada kerja yang dijalankan oleh plaintif untuk Menos. Oleh itu, terdapat pengkayaan tak adil oleh defendan (lihat perenggan 15).
- (2) Tuntutan dihalang masa, bukan atas dasar s 6(1) dan (2) Akta, tetapi di bawah s 6(6) Akta yang mana adalah peruntukan betul undang-undang yang menyokong had masa untuk tuntutan pengkayaan tak adil. Berdasarkan perjanjian di antara plaintif dan Menos, kausa tindakan plaintif bagi kesemua invois yang dikeluarkan oleh Menos tidak akan lebih dari 15 Julai 2008. Tempoh had masa yang beraplikasi kepada kausa tindakan plaintif terhadap defendan bergerak selaras dengan kausa tindakan plaintif terhadap Menos kerana kausa tindakan berbangkit akibat kegagalan Menos untuk membayar kerja-kerja pengiklanan. Kausa tindakan untuk plaintif terhadap defendan berbangkit dari tarikh perkhidmatan pengiklanan diberikan oleh plaintif kepada defendan. Tidak terdapat keperluan bahawa plaintif mesti sebelumnya memberikan notis tuntutan kepada defendan sebelum kausa tindakan untuk

pemulangan berbangkit (lihat perenggan 17, 19 & 22–25).]

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Notes

For a case on claim, see 6(3) *Mallal's Digest* (5th Ed, 2015) para 2379.

For a case on Contracts Act 1950, s 71 see 3(4) *Mallal's Digest* (5th Ed, 2015) para 7444.

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Cases referred to

Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd [2012] 4 MLJ 59, CA (refd)

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Blake; Re Petition of Right of AM Minahan, Re [1931] All ER Rep 372, Ch D (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (folld)

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Fuller v Happy Shopper Markets Ltd and another [2001] 1 WLR 1681, Ch D (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

United Logistics Sdn Bhd v Stamford College (PJ) Sdn Bhd [2016] MLJU 392, HC (refd)

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Legislation referred to

Contracts Act 1950 s 71

Limitation Act 1953 s 6(1), (2), (6)

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Lee Min Choon (Mohd Nor bin Md Derus with him) (Lee Min Choon) for the plaintiff.

Goik Kenzin (Nasir, Kenzin & Tan) for the defendant.

Mohd Firuz JC:

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[1] This is the decision of the court in respect of the plaintiff's claim and the defendant's counterclaim at the end of a full trial involving a total of only two witnesses (one each for the plaintiff and the defendant).

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BRIEF FACTS

[2] The plaintiff is a company incorporated in Korea and with its place of business in Seoul, Korea and carrying on the business of an advertising company.

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The defendant is a Malaysian company. In so far as the background of this suit is concerned, the defendant was the developer of a housing development project consisting of condominium units comprised of multiple blocks of

A buildings known as D’Rapport @ Ampang Condominiums at Jalan Nipah, Off Jalan Ampang, 55000 Kuala Lumpur (‘the defendant’s housing project’).

B By a business alliance agreement dated 12 June 2007 between the defendant and Menos 21 Co Ltd, a company incorporated in Korea and having its business address in Seoul, Korea (‘Menos’), the defendant and Menos agreed to work together to promote, market and sell the condominium units in the defendant’s housing project.

C It is an undisputed fact that the defendant and Menos had an ongoing business relationship existing in 2007 before the execution of the said business alliance agreement dated 12 June 2007.

D By an agreement dated 26 February 2007, Menos appointed the plaintiff to provide advertising services in Korea and abroad for the defendant’s housing project. Thereafter, from 26 February 2007–31 May 2008, the plaintiff provided advertising services for the defendant’s housing project.

E On 5 August 2008, the contractual relationship between the defendant and Menos became terminated without Menos having paid any claims in respect of the work carried out by the plaintiff in providing advertising services in relation to the defendant’s housing project.

Subsequently, at a date unknown to the plaintiff, Menos closed their office and could not be located.

F On 20 April 2009, the plaintiff sent a letter to Mr Samuel Ho, the defendant’s general manager at the defendant’s communications office at Seoul, Gangnam-gu, Nonhyeondong 206–16 Jungang BLDG 5F demanding payment of the sum of 971,357,841 Korean Won being the cost of the aforesaid advertising services for the defendant’s housing project provided by the plaintiff. The plaintiff demanded that the said sum of 971,357,841 Korean Won be paid by the defendant by 30 April 2009 failing which the plaintiff would resort to legal action.

G The defendant failed to comply with the plaintiff’s letter of demand dated 20 April 2009 resulting in the commencement of this suit.

H THE PLAINTIFF’S CLAIM

[3] The plaintiff’s claim against the defendant is based on two causes of action:

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- (a) s 71 of the Contracts Act 1950; and
 - (b) unjust enrichment as the plaintiff claims the defendant had been unjustly enriched by the advertising work provided by the plaintiff to Menos in respect of the defendant’s housing project.

ISSUES TO BE TRIED

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[4] Based on the pleadings filed by both parties, the following are issues requiring determination of this court:

(i) notwithstanding the undisputed absence of a contract between the plaintiff and the defendant, can the defendant be made liable for the value of the advertising services provided by the plaintiff for the defendant's housing project by reason of s 71 of the Contracts Act 1950 and/or unjust enrichment?

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(ii) has the defendant been unjustly enriched by the plaintiff's provision of advertising services for the defendant's housing project?

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(iii) if so, what is the value of the advertising services? and

(iv) is the plaintiff's claim time-barred?

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THE PLAINTIFF'S SUBMISSIONS

[5] In support of their claim, in summary, the plaintiff submitted as follows:

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(a) that the plaintiff had successfully proved the four pre-requisites under s 71 of the Contracts Act 1950 namely:

(i) the act carried out must be lawful;

(ii) the act must be done for another person;

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(iii) the act carried out must not be intended to be done gratuitously; and

(iv) the act must be such that the other person enjoyed the benefit of the act or delivery.

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[6] Based on the evidence adduced by the plaintiff, it was clear that:

(a) the act of providing advertising services in relation to the defendant's housing project was a lawful act;

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(b) the advertising services provided were not for the plaintiff's benefit but for the defendant's;

(c) the advertising services provided by the plaintiff was not intended to be gratuitous as the plaintiff was expected to be remunerated for the plaintiff's work by Menos; and, wherein the plaintiff was appointed by Menos which in turn was appointed by the defendant. However, Menos did not pay the plaintiff; and

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- A (d) the defendant benefited from the advertising services provided by the plaintiff.

B [7] The plaintiff further submitted that s 71 of the Contracts Act 1950 provides the remedy for unjust enrichment. Relying on the Court of Appeal decision in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59 the plaintiff was of the view that they had proven the three requisites required to prove so:

- C (a) that the defendant was enriched by the advertising services;
(b) that the benefit received by the defendant was at the plaintiff's expense;
and
(c) that the retention of the benefit by the defendant was unjust.

D [8] The plaintiff further relied on the decision of the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 which held that unjust enrichment is a distinct cause of action and independent of contract and tort.

E [9] As to the issue of limitation, the plaintiff took the view that there is no limitation period prescribed by Parliament for a cause of action based on unjust enrichment as it is a distinct cause of action and independent of contract and tort and therefore not caught by the limitation period imposed under s 6(1) of the Limitation Act 1953.

F [10] In the alternative, the plaintiff took the stand that the cause of action for unjust enrichment arose after the defendant had refused to comply with the plaintiff's letter of demand dated 20 April 2009. As the suit was filed on 28 April 2015, the plaintiff's suit was filed within the six years limitation period provided for under the Limitation Act 1953.

THE DEFENDANT'S SUBMISSIONS

- H [11] In summary the defendant's submission is premised on the following:
- I (a) the plaintiff's action is time-barred by virtue of s 6(1) and (2) of the Limitation Act 1953;
(b) there is no privity of contract between the parties herein and the fact that the defendant did not receive any benefit from the plaintiff; and
(c) there is no evidence of loss or damaged suffered by the plaintiff.

NATURE OF A CLAIM FOR UNJUST ENRICHMENT AND UNDER
S 71 OF THE CONTRACTS ACT 1950 A

[12] In a nutshell, the Federal Court decision in *Dream Properties* identified clearly the principles applicable for a claim under both the above headings. I find no reason to disagree with the submission of the plaintiff on the subject matter. B

THE COURT'S ANALYSIS AND FINDING

[13] Whilst the fact in this case can easily be distinguished from the facts in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*, I am of the view that the principles for a claim for unjust enrichment as propounded by the Federal Court in that case is applicable to the facts of the case before me. Here, a contract was entered between the plaintiff and Menos, the marketing agent of the defendant who was appointed by the defendant to market and sell condominium units in the defendant's housing project in Malaysia to the members of the public in Korea. C D

[14] The same principles were applied by Wong KK JC in the case of *United Logistics Sdn Bhd v Stamford College (Pj) Sdn Bhd* [2016] MLJU 392, the facts of which are rather similar to the present case where in so far as the fact that there was no privity of contract between the plaintiff and the defendant there but for the fact that it was the defendant who benefited from the contract between the plaintiff and SCB who was a third party. E F

[15] From the evidence adduced by PW1 both oral and documentary, there was ample evidence that the defendant benefited from the work carried out by the plaintiff for Menos. I therefore, hold that there was unjust enrichment by the defendant. G

ISSUE OF LIMITATION

[16] Notwithstanding my finding that the plaintiff had succeeded in proving their claim for unjust enrichment, this does not mean that the plaintiff is entitled to restitution. The defendant's submission that the plaintiff's case is time-barred warrants a further examination of the evidence adduced by both parties. H

[17] Based on the evidence before me, I am of the view that the claim is time-barred, not on the basis of s 6(1) and 6(2) of the Limitation Act 1953 as submitted by the defendant, but under s 6(6) of the same Act. I

A [18] At pp 14 and 20 of the plaintiff's submission, it was repeatedly argued that s 71 of the Contracts Act 1950 embodies the equitable principle of restitution and the prevention of unjust enrichment.

B Gunn Chit Tuan J in *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in Liquidation)* [1987] 2 MLJ 57 quoted *Pollock & Mulla* with approval:

According to the learned authors of that book, the section is not founded on contract but embodies the equitable principle of restitution and unjust enrichment ...

C [19] Whilst the defendants had re-produced the opinion of Low Weng Chung in his book *The Law of Unjust Enrichment in Malaysia* where the writer was of the view that a claim for unjust enrichment is time-barred by virtue of s 6(1) of the Limitation Act 1953 due to it being a quasi contract in nature, I am of the view that s 6(6) is the correct provision of law which supports the limitation of a claim of this nature.

[20] Section 6(6) states as follows:

E Subject to the provisions of Section 22 and 32 of this Act *the provisions of this section shall apply (if necessary by analogy) to all claims* for specific performance of a contract or an injunction or *for other equitable relief* whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

F [21] It is my view that the above provision applies explicitly to the facts before me.

[22] Upon reviewing the evidence given by PW1, I am mindful of the fact that PW1 had confirmed as follows:

- G (a) the advertising works carried out by the plaintiff was fully completed by end of May 2008;
- H (b) once the advertisement works were completed, all invoices in relation thereto, would have been issued to Menos at least 1 1/2 month from May 2008;
- (c) the last invoice issued by Menos was sometime in June 2008; and
- (d) under the advertisement agreement between the plaintiff and Menos, payment must be made within 15 days upon invoice being given by the plaintiff to Menos. That being the case, the plaintiff's cause of action for all invoices issued would have been not later than 15 July 2008.
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[23] Despite the plaintiff's cause of action against the defendant being materially different from the plaintiff's cause of action against Menos (which

would have been for breach of contract), I am of the view that the limitation period applicable to the plaintiff's cause of action against the defendant runs parallel with the plaintiff's cause of action against Menos as the cause of action arose out of the failure of Menos to pay for the advertising works (see the Federal Court decision in *Nasri v Mesah* [1971] 1 MLJ 32 (FC) and *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (SC)).

[24] Even if I were to view the advertising works carried out by the plaintiff as services rendered that benefited the defendant and not from the perspective of a breach of contract by Menos to pay the plaintiff for advertising works carried out, the cause of action for the plaintiff against the defendant arose from the date such services were supplied by the plaintiff to the defendant (see *Re Blake; Re Petition of Right of AM Minahan* [1931] All ER Rep 372).

[25] Whilst the plaintiff took the stand that the cause of action against the defendant arose only after the latter refused to comply with the plaintiff's letter of demand dated 20 April 2009, I decline to hold so as there is no requirement that a plaintiff must have first given a notice of demand to the defendant before the cause of action for restitution arises (see *Fuller v Happy Shopper Markets Ltd and another* [2001] 1 WLR 1681).

CONCLUSION

[26] In light of the above findings, there is no necessity for me to deal with issues to be tried no (iii): as to what is the value of the advertising services provided by the plaintiff to the benefit of the defendant.

[27] The plaintiff's claim is hereby dismissed with cost of RM40,000.

Plaintiff's claim dismissed with costs of RM40,000.

Reported by Dzulqarnain Ab Fatar

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